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Supreme Court

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United States

October Term, 1978

NO. 78-538

FRANK CRIPPEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER

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I.

REASONS FOR GRANTING THE PETITION.

Not only does the Solicitor's brief in opposition concede the conflict with *Slawik*, but Petitioner's urging in his petition that the materiality issue will occur over and over until resolved by this Court is coming to pass.

It has now been raised again in the Seventh Circuit and also in this Court. See Petition for Certiorari in *Edelson v. United States*, 581 F.2d 1290 (7 Cir., 1978), *Cert. pending* Case No. _____.

This Court should resolve this important conflict now. The Third, Fifth and Seventh Circuits have all been faced with this issue within the past year and have resolved it differently.

II.

DISCUSSION OF SOLICITOR'S CASES.

A. The Solicitor relies on *Markham vs. United States* 160 U.S. 319 (1895). This old case is merely one of the myriad of cases that can be cited for the proposition that a conclusory allegation of materiality is sufficient where the materiality of the statement is clear on the face of the indictment.

In *Markham* a veteran seeking a pension for a war connected injury testified before the Commissioner of Pensions. The indictment sets forth he lied when asked whether in fact he received the injury after the war or after his discharge. The materiality of that inquiry to the Pension Commissioner's determination of whether the man deserved a pension is obvious on the face of the indictment and *Markham* specifically stated so. *Markham* at 326. The wording of the indictment enabled the Court to engage in "meaningful judicial review of the materiality of the falsehoods." *Slawik* at 83, 84.

The *Crippen* indictment however, does not provide the Court with the tools provided in the *Markham* indictment. The indictment states the grand jury was investigating violations of the Price Sticker Act. 15 U.S. §1233. Contrary to the Solicitor's suggestion no scheme involving demonstrators or relating odometer tampering to price sticker removal was alleged or even suggested in the indictment. A reader of the indictment is unable to make any connection between odometer tampering and price sticker removal. In other words, there simply is no way a reviewing court can determine materiality on the face of this indictment.

Back in the *Markham* era this Court also held in *U.S. v. Cruikshank:*

> [The indictment must] "inform the Court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction". 92 U.S. 542, 548 (1876)

The detailed indictment in *Markham* is consistent with *Cruikshank*. The *Crippen* indictment is not. *Cruikshank* is simply the precursor of *Slawik*. *Slawik* is consistent with *Russell v. United States*, 316 U.S. 749 (1962) and *Sinclair v. United States*, 279 U.S. 263 (1929) in requiring, as a basic tenet of due process, that any reviewing court be able to see from reading the indictment alone the materiality of the defendant's testimony.

When the short hand equivalent of "materiality", i.e. "capability of impeding", is substituted for the word "materiality" the issue can be more clearly seen. The indictment, in essence, charged that Crippen's testimony concerning odometer tampering had the capability of

impeding the grand jury's investigation about price stickers. The logic is incomplete however. The conclusion does not follow. There must be a tie-in alleged between odometer tampering and price sticker removal. but no tie-in or scheme is ever alleged. It is impossible for a reviewing court to look at this indictment and determine how or why statements about odometers are capable of impeding a grand jury's investigations concerning price sticker removals. This distinguishes *Markham*.

What the Solicitor and the District Court do however, is infer a scheme and worse, suggest trial testimony proves there was a scheme. Both approaches are impermissible.

The ruse of the entire affair is best realized by the fact no scheme was proved at trial. The Defendant was charged with removing only *one* price sticker and the Judge granted a directed verdict on that count.

B. *Hamling vs. United States*, 418 U.S. 87 (1974), cited by the Solicitor, actually supports the Petitioner. It was not a perjury case, but it did distinguish those cases where tracking the words of the statute is sufficient from those, as here, where more must be done. Relying on *Russell vs. United States*, 316 U.S. 749 (1962) this Court emphasized that:

> Where guilt depends so crucially upon a *specific indentification of fact*, our cases have uniformally held that an indictment must do more than simply repeat the language of the criminal statute. (Emphasis supplied). *Hamling* at 118 quoting from *Russell* at 764:

Thus in the case at bar guilt depended crucially on the specific identification of the factual connection between odometer tampering and price sticker removal. Without that connection any statement about odometer tampering was not material because odometer tampering was not then a crime and investigating odometer tampering was beyond the scope of the grand jury's authority. Accordingly, a statement solely about odometers could not support a perjury conviction.

This indictment did not set forth that specific connection of fact and therefore under both *Russell* and *Hamling* it is insufficient.

C. The Solicitor also urges that the opinion of the Third Circuit in *Crocker vs. United States*, 568 F.2d 1049 (3 Cir. 1977) supports the Government's position. This is not so. *Crocker* relies on *Slawik*. The indictment in *Crocker* states far more than the Solicitor offers. It states the grand jury to be investigating payola pay-offs from record companies to radio station employees and that it was material to determine whether the defendant disc jockey had received any money from a record company. The defendant was charged with perjury for denying he had received pay-offs from certain record company employees to promote a company's record. *Crocker* at 1051, 1052, Like *Markham* the indictment in *Crocker* was sufficient because materiality was apparent on its face.

CONCLUSION

Until *Slawik* or *Crippen* is put to bed the proper materiality contents of a perjury indictment will be a continually relitigated issue. The issue has now arisen in three circuits, and it surely is rising to the top at this very moment in other circuits. Indictments which conceal from judicial review the question of whether the defendant's conduct was actually a crime are violative of due process. Petitioner respectfully submits that this petition for a writ of certiorari has import way beyond this case and should be granted.

Respectfully submitted,

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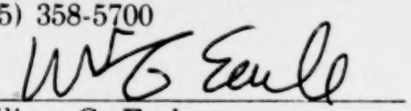
BY: 
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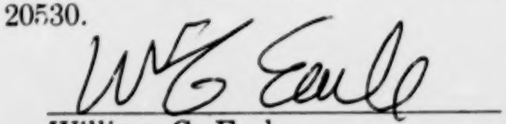
CERTIFICATE OF SERVICE

I certify that a copy of this reply brief was sent to the Office of the Solictor General of the United States of America, United States Department of Justice, Washington, D.C. 20530.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